SMITH & HUNT.

[To accompany Bill H. R. No. 317.]

MARCH 9, 1860.

Mr. ELIHU B. WASHBURNE, from the Committee on Commerce, made the following

REPORT.

Mr. WADE, *from the Committee on Commerce, to whom was referred the petition of Smith & Hunt, for relief in the case of certain railroad iron, submits the following report:*

The facts in this case are in substance as follows: During the years 1853 and 1854 the petitioners were storage, commission, and forwarding merchants, resident and doing business at Toledo, in the State of Ohio, the same being the port of entry for the United States collection district of Miami. During the said years of 1853 and 1854 the petitioners, as such carriers and commisson merchants, brought from New York city, under the provisions of the warehousing act, in bond for the payment of the duties on the same at Toledo, four thousand (4,000) tons of railroad iron, and paid freight, storage, etc., the charges thereon; the said iron having been imported into the port of New York for the Cincinnati, Logansport and Chicago railroad company. These charges, paid by the petitioners while the said iron was in bond, constituted a legal lien on said iron in favor of the petitioners, to the amount of nine thousand two hundred and sixty-five dollars and ninety cents, (9,265 90;) subject, however, to the prior lien of the United States for the payment of the import duties chargeable on said iron.

The committee further find that the just legal charges of the petitioners constituting a legal lien upon said iron, subject to the prior lien or right of the United States, amounts to the said sum of nine thousand two hundred and sixty-five dollars and ninety cents, (9,265 90.)

The committee further find that while this railroad iron was in the legal custody and control of the petitioners at Toledo, as above stated, subject only to the paramount lien of the United States for the duties chargeable against the iron, the said railroad company was insolvent and unable to pay the duties due the government on said iron, or to pay the petitioners their just charges on the same, and that this fact was fully made known by the petitioners to the then Secretary of the Treasury.

The committee further find that while the said railroad iron was in the legal custody and control of the petitionsrs, the officers and agents

of the railroad company had conceived the purpose of getting possession of said railroad iron, through the authority and agency of the Secretary of the Treasurer of the United States, so as to divest the lien of the petitioners for their just charges against the iron as stated above. This purpose of the officers of the railroad company being made known to the petitioners, they informed the then Secretary of the Treasury of the said purpose, and then and there offered to pay, and would have paid, into the treasury of the United States the full amount of the duties and charges claimed as due the United States upon said iron, which offer was wholly refused by the Secretary of the Treasury, and a peremptory order issued by the Secretary for the delivery of the iron by the petitioners to the agents and officers of said company; which order the petitioners felt bound to obey, inasmuch as prior to this the collector of the port of Toledo had taken the forcible possession and control of said iron from the petitioners, thereby damaging if not destroying the lien of the petitioners on the iron: upon which the petitioners caused a writ of replevin to be issued to repossess themselves of the iron, and then and at the time of the service of said writ of replevin, tendered and offered to pay to said collector of the port of Toledo, in specie, the full amount of the duties due the United States upon said railroad iron, which tender was refused by said collector, acting under the directions and the express order of the then Secretary of the Treasury.

Under this state of facts there is no doubt that by such rigorous exercise of a discretion deemed by the Secretary of the Treasury necessary to be so exercised—which discretion, however, could and ought to have been exercised, first, to save the United States from loss, and then to have enabled the petitioners to save their just, legal, and equitable liens upon the said railroad iron—the petitioners lost their legal and equitable claim or lien on said iron in the amount before recited.

That this amount of money, justly due to the petitioners, and secured to them by a just and universally recognized lien upon the iron, was lost to the petitioners without any corresponding benefit to the United States, is placed beyond any rational doubt. This injury was effected in consequence of the manner in which the discretion vested in the Secretary of the Treasury was exercised. If such discretion had been so exercised by a subordinate officer of the government, he would unquestionably have rendered himself personally liable for the damages accruing therefrom, but which, in the present case, may and ought to be imputed to the government itself. It would, however, be against public policy to hold the head of a department personally responsible for his official acts.

The committee, therefore, report a bill in favor of the claim of the petitioners for the payment of the sum of $9,265 90, as the amount justly due.

The petitioners made claim for interest from the time of the payment by them of the above amount; but your committee have been restrained from entertaining that portion of the claim in deference to the heretofore general practice of the government thereon.

ADDENDA.

Papers submitted with the report to be printed.

1. Petition, marked "A."
2. Statement of facts, marked "B."
3. Record of court, marked "C."
4. Additional evidence, marked "D."
5. Statement of Collector of Toledo, marked "E."
5½. Letter of D. B. Smith, marked "E E."
6. Letter of the Secretary of the Treasury to Hon. John Cochran, marked "F."
7. Smith & Hunt's reply to the letter of the Secretary of the Treasury, marked "G."

A.

Petition of Denison B. Smith and John E. Hunt, Jr., for payment of transportation, &c., on Railroad Iron, held by them in bond at Toledo, Ohio.

To the Senate and House of Representatives of the United States, the memorial of the undersigned respectfully represents:

That during the year 1853, and afterwards, they were warehousemen and forwarders, doing business at Toledo, Ohio, and as such made an arrangement with the Cincinnati and Chicago Railroad Company in the said year, 1853, to receive and forward to Logansport, Indiana, a large quantity of railroad iron. Their agreement was at fifty cents per ton for receiving and forwarding, it being supposed, from the course heretefore pursued, the iron would be shipped from the vessel directly to the canal boats without going on to the docks.

The iron commenced arriving in the fall of 1853, and, as the railroad company could not pay the duties upon it, was put on our docks, and on docks leased by your memorialists for that purpose, and warehouse bonds executed to the United States for duties. In the spring and summer of 1854 the balance of the lot arrived at Toledo, in all about four thousand tons, and all of it placed on business docks in the centre of the harbor, convenient for shipment, under the expectation that the duties would be immediately paid and the iron shipped. On a large portion of this iron your memorialists paid tranportation from New York, some portion of which was refunded. During the winter of 1854–'5, seeing no evidence of ability in the company to pay the lien of your memorialists for transportation and storage, they petitioned the court of common pleas at Toledo for authority to sell so much of the iron as was neccssary to pay said lien, subject to the claim of the United States for duties. In the month of May or June following the case was reached, and the railroad company appeared by counsel and defended. The rate of storage and amount of said lien was proven, and your memorialists were authorized to enforce the

collection of the same by a sale of the property, subject as above stated to government duties. The railroad company was broken up, could pay nothing, and had already assigned much of its interest in this property for money borrowed in various places, and as the holding of the iron longer had become inconvenient, your memorialists knew of no other course to pursue to get their money, and are yet to be convinced that their proceeding, as between individuals, was not regular and legal. The government had no bonded house or yard, nor had special places been as yet arranged, and the iron from first to last was on the docks of your memorialists, and under no other supervision or control than their own.

In the spring of 1855 the railroad company made an arrangement with John W. Wright & Co. of Logansport, Indiana, under which Wright & Co. were to lay this iron on the track of the company, and they were to get possession of it the best way they could. Wright & Co. first obtained a writ of replevin from the United States court at Cleveland upon their oath that the iron was improperly withheld from them, when they knew the charges had been declared a just lien upon the iron in a court where the company appeared and defended. In this state of the case your memorialists refused to deliver it unless their charges were first paid. Wright & Co. next applied to the Collector of the Port of Toledo to enter bonds for the transportation of the iron to Evansville, Indiana. When informed of this your memorialists felt alarmed; knew it was a plan to get possession of the iron without payment of the charges or duties. *Your memorialists had signed warehouse bonds for nearly or quite all this iron, and immediately offered the duties to the collector on the entire lot or any portion of it. The duties were declined, and bonds were given* by the company to take the iron to Evansville, a point three hundred miles south of the real destination of the iron, which was Logansport, Indiana. John W. Wright made oath that they intended to take the iron to Evansville. Your memorialists being directed by the collector to deliver the iron to the company, at first refused to give up possession; but supposing that when the Treasury Department should see that a fraud was being committed upon them under cover of the revenue law, it would not lend its aid to it, they delivered to the company only a few hundred tons. They then sent a man to Logansport, to trace the iron, who found that on arrival there it was all unloaded and sent into the interior. Your memorialists stated the facts to the collector, who thereupon made a stetement to the Treasury Department, enclosing their history of the matter. The department, by telegraph, having ordered the iron to be held here, your memorialists then made a full statement to it direct, giving full information respecting the plans of the company, their insolvency, the efforts your memorialists to collect their money, and the fact that they should certainly lose their debt if the company were permitted to get possession of the iron in the manner designed. They also informed the department that the portion of iron delivered to go to Evansville had been unloaded at Logansport.

Your memorialists further show that Wright, and his friends from Indiana, had an interview with Secretary Guthrie, and prevailed upon him to countermand the order to withhold the iron. The collector

was directed to see that it was immediately delivered to the company. The collector so directed your memorialists, but they refused on the ground before stated. They had transported and stored this iron under an agreement that it was to go to Logansport, Indiana, which was not a port of entry, and of course under an implied agreement that the government would collect its duties at Toledo, and release its lien which would make theirs good; and if the destination was to be changed that the iron would be sent to some other port of entry, to which point your memorialists could send their charges by bill of lading, and at that point, when duties were paid, their charges would have been a lien on the property. The United States fully advised that if they permitted the balance of the iron to go into the possession of the company in the manner above stated your memorialists would not only lose their lien but their debt. By direction of your memorialists the sheriff undertook to seize a portion of the iron and garnisheed the collector, and again tendered to him the duties. The department, however, acting under the strict regulations of law, directed such proceedings to be had by the United States officers as to secure to the company the possession of the iron without payment of charges. The collector commenced the forcible delivery of it without the consent of your memorialists, who objected and forbade its delivery, and thereupon the United States District Attorney with a force of men commanded the iron to be delivered in the name of the United States, after which your memorialists did not feel authorized to prevent its delivery.

The iron all went to Logansport and was unloaded there. As it did not reach Evansville, the collector of Toledo, being informed from time to time of the fact, went to Logansport, by direction of the Secretary of the Treasury, to collect the duties, or seize the iron. The iron was found, much of it laid on the track and along the track ready to be laid, and the balance piled up, and was all seized by the collector. The seizure subjected the iron to the penalty in the bond, which was one hundred thousand dollars. This penalty might have furnished a fund to reimburse your memorialists, but the department, probably taking into view the looseness of the former practice and the embarrassments of the railroad company, and knowing that if it enforced the penalty, it could not without authority pay your memorialists, contented itself with enforcing the duties only and released the penalty.

This law, which your memorialists understand began first to be enforced by Mr. Guthrie, secured to the importers the control of their goods without regard to charges, and the further right to transport them from one port to another. It further kept such goods in the legal custody of the revenue law and officers until the duties were paid and the goods delivered, whilst prior to his incumbency a practice prevailed, when goods were to be transported in bond, of delivering them to the importers, or their agents, and looking alone to the transportation bond for the duties.

And your memorialists respectfully claim and maintain that, whenever government, and especially a just and parental one like this, finds it necessary in carrying out its just policy, to enact a rigorous law, or put in sudden force one hitherto disregarded, which shall materially

interfere with the ordinary rules of dealing between individuals, and thereby inflict great loss upon a citizen, it is bound by every principle of equity and fair dealing to repair such injury and recompense such loss.

Your memorialists received this iron as warehousemen, and paid charges upon and held it a long time at great expense, under an arrangement to send it to Logansport, and of course, under the revenue laws as before applied, supposed duties would be paid at Toledo, and the lien of the government released; and if the government had not changed its former practice, permitted the iron to be withdrawn from warehouse and transported further, as the revenue laws seemed to allow, they could have collected their money.

Merchandise in bond for duties is held by the government above all other liens, and perhaps in the strict letter of the law is exempt from legal process. But your memorialists suppose those laws were made for the protection and security of the revenue, and when that is not in jeopardy, if the consent of the United States *is* necessary, ought not the warehouseman's lien, *created by the operation of these bond laws*, to be allowed to reach, by an order to sell, the *interest* which the owner himself could divest himself of by sale? And if, without necessity, the government interpose its power and forces merchandise out of the possession of the warehouseman, and before payment of duties, permits it to be taken inland, where there is no port of entry, does it not thereby place itself in the position of assuming to pay the charges? Your memorialists were not unwilling to have the iron go to Evansville, where it was bonded to go; and if the government had insisted upon that, they could have sent forward their charges, and, when the duties were paid, could have collected them; but as the iron only went to Logansport, and into the possession of the railroad company, they were debarred from the recovery of their just rights.

The United States at the time in question had provided no bonded warehouses or yards at Toledo, and as the iron arrived and was put in bond, the collector engaged your memorialists to hold it on their docks, for the government, on account of its duties, and took their receipt therefor.

Your memorialists were liable on a large portion of the warehouse bonds, and supposed by the terms of the bond that they had a right to pay the duties.

Do the United States recognize no other interest in merchandise but their own assessment for duties, when it is sought to subject the property to the payment of such liens as attach to the goods by the process of transportation and storage? The statutes of the United States authorize the transportation of merchandise from the seaboard into the interior, and from one port to another, and for the security of the government require bonds in double the amount of the duties thereon. So also in warehousing goods. The goods cannot be transported or stored except in the usual manner of tranpsorting and storage business, on non-payment of charges for which, at common law, in equity and in admiralty, when transported on water, a lien attaches, to the interest of the owner therein, subject only to the payment of the

public duties. When, therefore, these duties are paid or discharged, the lien of the transporter or warehouseman becomes paramount.

If the government interfere to prevent without necessity, for its own protection, the operation of said lien, does it not thereby become liable to pay it?

Your memorialists have endeavored in the foregoing statement to present a true history of the circumstances surrounding this case, and conceiving that great and manifest injustice has been done them by the course which the government has seen fit to pursue, humbly invite the favorable action of your honorable bodies in their behalf, and ask that relief from the heavy loss which they have thereby sustained, which is most justly and equitably due.

And your memorialists, as in duty bound, will ever pray, &c.

DENISON B. SMITH.
JOHN E. HUNT, JR.

United States to Smith and Hunt, *Dr.*

July, 1855.—For charges on railroad iron in bond for Cincinnati and Chicago Railroad Company, and withdrawn from warehouse by owners, under direction of United States revenue officers, say..... $9,265 90

The above sum was declared to be due us by verdict of Lucas court of common pleas, and transcript of proceedings and judgment is on file.

On page 15 of transcript judgment is rendered for amount due to February 1, 1855, and on page 14, it is declared what shall be a fair compensation for same service continued until iron is removed and stock released.

[E. & O. E.] SMITH & HUNT.

TOLEDO, O. *July* 15, 1855.

B.

Statement of facts.

During the year 1853, and subsequently, we were *forwarders* and warehousemen at Toledo, Ohio, and as such we made a contract with the "Cincinnati, Logansport, and Chicago Railroad Company" to receive from New York, and transport to Logansport, Indiana, four thousand tons of railroad iron. This iron was imported at New York, and transported to the Toledo collection district in bond for import duties. Toledo was the last collection district between New York and Logansport, the final destination of the iron. It commenced arriving in the fall of 1853—the original intention being to send it forward at

once, but the company had met with embarrassments, and were unable to pay the duties and withdraw it from bond. Of course this made it necessary to "warehouse" the iron, and it was landed on our docks. Smith & Hunt, with their friends, executed to the United States new bonds, called "warehouse bonds," for the duties. In the spring and summer of 1854 the balance of the lot arrived, in all about four thousand tons, and all of it was stored upon business docks in the centre of our harbor, under expectation and agreement, from time to time, that the duties should be paid and the iron forwarded. On a large portion of this iron we paid transportation charges from New York to Toledo, a portion of which was refunded. The embarrassments of this railroad company increased, and finally it became evident they *could not* raise the means to pay duties. They were notoriously insolvent; and being unwilling longer to hold this property, we petitioned our court of common pleas, in the winter of 1855, for the power to sell so much of the interest of the owners in this iron as was necessary to pay our lien for transportation and storage, subject, of course, to the lien of the United States for duties. In the spring following, the case was reached; the company appeared by counsel and defended; our account for charges was adjusted, and we were authorized to sell, as petitioned, subject to governmental duties.

In process of time the agents of the company, who had purchased the iron in Europe with the bonds of the company, became impatient at such waste of time, and it became necessary for the company to lay it down on their track. A very unscrupulous agent of the company resorted to dishonesty and deception with the United States government; and with the aid of government, and, indeed, under *force* used by government, the company succeeded in obtaining possession of this iron without the payment of our charges.

This agent made application to the collector of the port at Toledo to withdraw the iron from warehouse, and to enter bonds to transport it to Evansville, on the Ohio river. Logansport is not a port of entry, and Evansville, although more than two hundred miles south of the line of this railroad, was the next collection district on the Wabash canal.

This line of railroad extends from Richmond, Wayne county, Indiana, to Logansport, and thence to Chicago. Evansville is the extreme southern point in that State. Of course we knew this movement was not intended, but was a fraudulent attempt to obtain possession of the iron without payment of charges or duties.

We informed the collector of the port of the intentions of the company, and tendered him the duties upon the entire lot; but our offer was declined, and bonds were executed for the transportation of the iron to Evansville, the agent making oath to the intention of the company to take it to that point.

The company having executed their bond to transport to Evansville, attempted to take possession of the iron, which we resisted. Subsequently, believing the treasury officers at Washington would cheerfully prevent the execution of this wrong, when fully convinced of such an intent, we released to the company a few boat loads. It was all put into canal boats, hired to transport it to Logansport, and not

to Evansville. We sent a man to Logansport to trace these cargoes, which, on arrival there, were unloaded, and the iron sent out on the track of the company. We wrote a statement of these facts to the collector at Toledo, who certified to it, and sent it to the Treasury Department at Washington. We also wrote to the Secretary at Washington, giving him full information, not only in respect to this point, but of the fraudulent intentions of the company, that they were insolvent, and that we should certainly lose our debt against them if they were permitted to obtain possession of the iron in this manner.

Upon receipt of the letter above referred to, the Acting Secretary of the Treasury, by telegraph to the collector, directed him to suspend the delivery of the iron, and to hold it at Toledo.

Subsequently to this direction of the Acting Secretary to hold the iron at Toledo, this agent, and others interested, had an interview with Mr. Guthrie, at Louisville; and that gentleman, as we believe under an entire misapprehension of the facts, was induced to countermand the order above referred to, and directed the collector to see the company put in possession of the iron. The collector so directed us, but we declined, upon the ground, under advice, that the proceeding was not only in conflict with what had been the practice of the service, but was without the sanction of law.

It must be borne in mind that the United States had been secured for their duties by good and sufficient bonds in double the amount of the same; and the plain inference to be drawn from Mr. Guthrie's letter countermanding, &c, is that the government did not look to the iron for its security during the life of those bonds. By our direction, the sheriff here attempted to subject the interest of the owners of this iron to attachment, under his order from our court of common pleas, first tendering to the collector again the duties on the entire lot in money, and afterwards garnisheeing him. The Treasury Department, however, directed such proceedings to be had by the United States officers as secured to the company the possession of the iron. The collector commenced the forcible delivery of it. We objected, and forbade him, and thereupon the United States Attorney of the district, with a force of men, commanded the iron to be delivered in the name of the government; after which we did not feel authorized to resist, nor advise the sheriff to do so. The company obtained possession of all the iron, and it all went to Logansport and was unloaded there.

At the maturity of the bonds given for transport of the iron to Evansville, and upon advice of non-delivery of the iron to the Evansville collector, the collector at Toledo was directed to go to Logansport and collect the duties or seize the iron. He found it along the track of the company and made seizure of it. The United States Attorney was directed to prosecute the bonds for the duties and penalty.

This seizure presented another occasion, it seems to us, for securing our lien. The department might have exacted the penalty, with a view to our reimbursement; but it exonerated the company from liability, and subsequently received the duties at Washington; and the bonds, together with the perpetrators of this deliberate and intended violation of law, were released.

We claim, then, that by the course pursued, the United States government has placed itself in the position of assuming fairly and equitably our lien for charges, and for the following reasons:

First. We received this iron as warehousemen, and paid charges upon it, and held it a long time at great expense, *under a contract to transport it to Logansport.* The owners could never have obtained possession of it, either by force or law, before payment of charges, had not the government lent its aid. The government did interfere between the parties to this contract, and by an exercise of its power, and in a manner totally at variance with its former practice, forced this iron out of our possession. The United States statutes of 1846 and 1854 authorize owners of merchandise and transporters to contract together for transportation to the interior merchandise in bond for duties; and it should not interpose its power, when such an engagement is half complete, and without necessity for its own protection, force the goods from the possession of the transporter or warehouseman without payment of the charges which have accrued.

Second. On arrival of this iron at Toledo, the transportation bonds were cancelled, and it was entered for warehousing, and *we* gave the bonds. The destination was Logansport, and therefore the laws and customs of the department made it necessary for the *duties to be paid at Toledo*, or the iron forwarded to another collection district. There is no other way consistent with law or custom, and we placed our whole reliance upon it. This known practice and these laws were a positive guaranty that the United States would settle here for its duties, and release its lien, or, if the owners desired it to go to some other collection district, to permit it to be done by the persons who had transported and stored it, and acquired thereby a lien upon it for such charges, subject to the lien of government. The practice of the government in this respect was wholly changed in this one instance, without notice, and to our great loss.

Third. Merchandise in bond for duties is held above all other liens, and in common cases may be exempt from legal process; but, conceding this point, the department committed great injustice to Smith & Hunt, in compelling them to deliver this iron, and permitting no attempt on their part to collect their charges. This delivery to the owners, under these circumstances, justifies the assumption that the iron was withdrawn for consumption. Under the laws and regulations of the revenue department, such withdrawal could not be made until duties and charges were paid, and then our lien would have been first. If it *was* a withdrawal for consumption, then the department intended to look to the company for their duties. If, on the contrary, the government claim that the iron was "permitted," for transportation in bond to Evansville, they looked to those bonds for their duties, as there was a penalty attached of double the amount of duties for non-delivery, and in that view of the case we should have been protected in the only possible method open to us, to collect our charges, viz: attaching the owners' interest. Secretary Guthrie instructs the Toledo collector to deliver the iron, if he had good and sufficient bonds for duties and the penalty for non-delivery. The government knew

that the iron was not going to Evansville, but to Logansport, as they were fully informed of the disposition of it from time to time.

Fourth. This lien was created by the operation and the carrying out of these laws. The government must depend upon private enterprise to execute the transportation of merchandise in bond, viz: canal boats, vessels, and railroad cars. The government, and whatever private interest may be engaged, are connected, and the latter depends upon the former for protection of its well-earned lien for transportation and warehousing; and when the government prevents such interest from subjecting the owners' property to be sold for the charges, and forces the goods out of the channel, should it not assume to pay those charges? If the United States recognize no other interest in merchandise but their own assessment for duties, when it is attempted to subject the property to the payment of such charges as must grow upon it by this transportation and storage, in a spirit of common justice and protection of the rights of its citizens, should it not justify an effort to collect those charges, and certainly not prevent it?

Fifth. We were willing to transport this iron to Evansville if the department had not forced the iron out of our possession. We should have forwarded it to Evansville by some one of the responsible lines of boats then doing business on that canal, precisely as it had been forwarded from New York to Toledo. We should have made our bills of lading, and received our charges, and the iron would have been *delivered at Evansville.* Instead of so doing, the department gave the owners possession of it, at Toledo, thus taking it from the possession of the carriers when their engagement was half complete.

Sixth. There are no bonded yards or warehouses at Toledo, and the collector engaged us to hold it on our docks for the United States, and took our receipt for it.

Every principal allegation in this statement is supported by statements from the collector of Toledo and United States district attorney.

Section 4 of the statute of 1854 distinctly states upon what condition goods may be withdrawn from consumption, viz: payment of duties and such charges as may be due. The same act, sections 1 and 2, declare bonded warehouses and yards, public or private, are one and the same—that the government is not responsible for charges that may grow on the property; and we presume it is not in the ordinary cases, but it clearly recognizes the right to insist upon the payment of charges, and to enforce the collection of them.

SMITH & HUNT.

TOLEDO, *Ohio, February* 1, 1860.

C.

Record.

THE STATE OF OHIO, *Lucas County* } Court of Common Pleas.

DENISON B. SMITH and JOHN E. HUNT, jr., *Plaintiffs.*

vs.

THE CINCINNATI AND CHICAGO RAILROAD COMPANY AND OTHERS, *Defendants.*

Pleas before the Court of Common Pleas within and for the County of Lucas and State of Ohio, at a term began and held on the second day of July, in the year of our Lord one thousand eight hundred and fifty-five.

Be it remembered that heretofore, to wit, on the 1st day of February A. D. 1855, said plaintiffs by their attorneys, filed in the office of the clerk of said court of common pleas, a certain petition in the words and figures following, to wit:

Petition.

COURT OF COMMON PLEAS, *Lucas County.*

Denison B. Smith and John E. Hunt, jr., plaintiffs, *vs.* The Cincinnati and Chicago Railroad Company, James Pullen, Henry Fitzhugh, Dewitt C. Littlejohn, John A. Duble, Joseph G. Gibbon, Omar Tousey, Joseph H. Cromwell, and Reeves, Stephens & Co., defendants.

The plaintiffs say that on the first day of January, A. D. 1853, they were, and from thence hitherto, have been warehousemen, and engaged in the business of forwarding, storage, and commission, at Toledo, in the county of Lucas and State of Ohio; that in or about the month of October, A. D. 1853, the Cincinnati, Logansport, and Chicago Railroad Company, a corporation duly incorporated by the laws of the State of Indiana, located and doing business within that State, by James Pullen, one of the directors of said company, and duly authorized agent, applied to them, the said plaintiffs, in their capacity as warehousemen, to receive at Toledo and forward to said company from that place a large quantity of railroad iron, which was then in the course of transportation, and to be used in the building and construction of a railroad then in the process of construction by said company in the State of Indiana; that upon the application of said Pullen the plaintiffs did agree to receive and forward said railroad iron for said company, and for their so doing were to be paid such sum as their services in that behalf might reasonably be worth; that in accordance with said agreement and contract the said railroad company commenced delivering its iron to them on the 28th day of October, A. D. 1853, and did, during the months of October and November of that year, deliver to them railroad iron as follows:

October 28, by schooner Palestine, 745 bars, weighing 274,352 lbs.
November 2, by schooner Empire State, 600 bars, weighing 201,400 lbs.

November 3, by schooner Sylph, 834 bars, weighing 270,460 lbs.
November 3, by schooner Abigail, 891 bars, weighing 314,832 lbs.
November 7, by schooner Vincennes, 1,239 bars, weighing 437,600 lbs.
November 10, by brig Thornton, 1,575 bars, weighing 566,795 lbs.
November 12, by brig Mahoning, 518 bars, weighing 182,810 lbs.
November 19, by schooner Ramsdell, 1,186 bars, weighing 409,149 lbs.
November 22, by brig Hampton, 611 bars, weighing 213,900 lbs.
November 22, by schooner Scheredin, 1,221 bars, weighing 421,680 lbs.
November 25, by barque Hungarian, 1,076 bars, weighing 376,600 lbs.
November 26, by schooner Oriental, 421 bars, weighing 152,082 lbs.
November 28, by schooner Reed Rigs, 264 bars, weighing 94,663 lbs.
November 28, by brig Clarion, 43 bars, weighing 13,970 lbs.
November 29, by brig Paragon, 307 bars, weighing 109,925 lbs.
November 29, by brig Andes, 1,189 bars, weighing 419,759 lbs.

And that during the months of April and May, A. D. 1854, in pursuance of the same contract and agreement, said company made a further delivery of iron to them as follows:

April 20, by brig Acadia, 833 bars, weighing 292,114 lbs.
May 2, by brig Oxford, 300 bars, weighing 103,800 lbs.
May 3, by schooner Hazelton, 316 bars, weighing 114,809 lbs.

The plaintiffs further say that said railroad iron, when received by them, was subject to the lien of the United States thereon for duties on the importation thereof, and that said railroad company being unable to raise the money to pay said duties, bonds were executed to the United States for the payment of such duties, and the iron was to remain in store with them, the said plaintiffs, as warehousemen, until the same should be paid.

The plaintiffs further say, that in order to assist the said railroad company in the payment of the transportation charges upon said iron received by them during the months of October and November, A. D. 1853, they advanced moneys for said company as follows, to wit:

1853.

November 4, for charges on castings sent to Logansport....	$46 11
November 21, cash paid on transportation.....	200 00
November 24, cash paid on transportation.....	50 00
November 25, cash paid on transportation.....	100 00
November 29, cash paid on transportation.....	300 00
December 3, cash paid on transportation.....	352 43
December 5, cash paid on transportation.....	100 00
December 20, cash paid on transportation.....	19 60
Total.....	$1,168 14

And that on the 20th day of December, A. D. 1853, said company was indebted to them for such advances in said sum of eleven hundred and sixty-eight $\frac{14}{100}$ dollars; that said company was at the time unable to meet the payment, and that said Pullen, as the agent of said company, proposed to the plaintiffs if they could raise the money through any of their correspondents upon a draft at four months' time, the said company would pay the discount upon such draft and such commissions

as they, the said plaintiffs, should be compelled to pay, in order to procure an acceptor upon the same, and provide the funds to pay said draft at maturity; that the plaintiffs did thereupon negotiate with Benjamin H. Buckingham, of the city of New York, for the acceptance of their draft upon him payable in the city of New York in four months from date for the sum of eleven hundred and fifty dollars, for which they paid him the usual commissions charged in such cases, of two and one-half per cent.

That after procuring the acceptance of said draft they obtained a discount thereof, for which they paid the legal interest in advance for the time said draft had to run, being $23 57. The plaintiffs further say that the funds to pay said draft were provided by said company when it matured, and applied to take up the same.

The account for advances made upon said iron received during the year A. D. 1853, will therefore stand as follows, to wit:

Amount of advances as per statement hereinbefore made...	$1,168	14
Paid discount on draft.....	23	57
Paid commissions for accepting.....	28	75
	1,220	46
By amount of draft paid by company.....	1,150	00
Balance due plaintiff, as of the 20th day of December, A. D. 1853.....	70	46

The plaintiffs further say that the said iron received during the months of May and April, A. D. 1854, came to them subject to the lien of the carriers thereon for the transportation of the same from New York to Toledo, the storage thereon during the winter, and for other charges thereon in favor of the carriers; and that at the request of said railroad company upon receiving said iron, they, the said ptaintiffs, paid said charges to said carriers as follows, to wit:

April 20, on amount received per brig Acadia for transportation charges.....	$1,022	40
For winter storage in Oswego.....	73	02
May 2, on amount received by brig Oxford, for transportation charges.....	246	53
For general average expenses.....	207	90
May 3, on amount received by schooner Hazleton for transportation charges.....	272	67
Total.....	1,822	52

Making the whole amount advanced by said plaintiffs to pay the transportation and other charges upon said iron received during the year A. D. 1854, $1,822 52; that said advances were made at the request of the agents of said company; and that for so doing they, the said plaintiffs, are entitled to be paid the usual and customary commissions in such cases. And the plaintiffs further say that the

customary charges among warehousemen and forwarders for advances made by them in the course of their business upon property consigned to them for transportation, is two and one-half per cent.; and that they, the said plaintiffs, are entitled to receive that amount for said advances on account of the company ; and that the same amounts to $45 56.

The plaintiffs further say, that when they received said iron, during the year A. D. 1853, from said company, it was too late for the transportation thereof during that season to any point beyond Toledo, and it became necessary to hold the same in store at Toledo for said company during the winter of that year.

And that said Pullan, acting as the agent of said company, and in its behalf, finding such necessity existing, agreed with the plaintiffs that if they would hold the same in store during said winter and for said company, and until a convenient time for the shipment of the same after the opening of navigation in the spring, as a compensation therefor the said company would pay them, the said plaintiffs, at the rate of one dollar for each and every ton. The plaintiffs further say, that they did hold said iron in store for said railroad company until the opening of navigation in the spring, and that by reason thereof they have become entitled to receive from said company for such winter storage the sum of $2,240 in addition to their other charges against said iron.

The plaintiffs further say, that when they agreed to receive said iron as aforesaid, they were then in the use and occupation of a warehouse and dock in Toledo, under a lease which extended and continued until the then next April ; that at the time of their agreeing to receive said iron and hold the same in store, it was the understanding and agreement that they should hold said iron only until a sufficient time after the opening of navigation the then next spring to enable them, the said plaintiffs, to provide the means for the shipment of the same, and that said railroad company would pay off and discharge the lien of the United States for duties in time to enable the plaintiffs to ship the same as soon as navigation opened ; that their lease expired to the said warehouse and dock then occupied by them on the 1st day of April, A. D. 1854 ; that a part of said iron was stored in their said dock ; and that upon the expiration of their lease they made an arrangement with the tenant who succeeded them in the occupation of said warehouse and dock to permit said iron to remain thereon until a reasonable time had elapsed to enable them to provide the means of shipping the same, in consideration that said plaintiffs would pay to them a reasonable compensation for the storage thereof during such time as the same should remain upon their dock ; that said company neglected to provide money for the payment of the duties upon said iron, and they therefore were unable to ship the same from Toledo upon the opening of navigation.

That the tenants occupying said dock permitted the same to remain thereon until the first day of July, A. D. 1854, when they gave the plaintiffs notice to remove the same ; and the said plaintiffs were compelled to and did provide men and boats and removed the same to another dock, and in so doing expended the sum of $171 26, all of which expenditure was occasioned by the neglect of said company to

pay the duties upon said iron, and thereby enable the plaintiffs to ship the same as by their engagement with said company they had bound themselves to do.

The plaintiffs further state, that they have been compelled to pay and have paid the further sum of $17 28 for the removal of iron stored upon a dock which had been crushed by the weight and long-continued storage of said iron upon the same; and which was also rendered necessary by the failure of said company to pay the duties, and put the plaintiffs in a situation which would enable them to ship said iron in a proper time.

The plaintiffs further say, that a reasonable and the usual and customary compensation for receiving and storing said iron for thirty days after its receipt is the sum of fifty cents for each and every ton thereof; that a reasonable time for the shipment of the same, after the opening of navigation in the spring, would have been the first day of June, and that their contract for the winter storage expired at that time.

The plaintiffs further say, that said railroad company have entirely neglected to pay the duties upon said iron, and that without their so doing the plaintiffs could not ship the same, and that said company have also to this date neglected and refused to pay the plaintiffs anything on account of the advances made by them, except, as aforesaid, in the payment of said draft; or for the storage thereof, although the plaintiffs have long since been entitled to receive such payment, and have frequently called upon them to make the same.

The plaintiffs further say, that the season of navigation for the year 1854, during which said iron might have been shipped by them for said company, expired on the first day of December, A. D. 1854, and that a reasonable compensation for the storage of said iron, from the first day of June until the first day of December, is ninety cents for each and every ton thereof; and that they are entitled to receive compensation for the same from the said defendants at that rate.

The plaintiffs further state, that the entire amount of their charges against said iron for advances and storage until the first day of December, A. D. 1854, is as follows:

1853—Dec. 20,	balance for advances 1853, as hereinbefore set forth	$70 46
1854—May 3,	advances on amount received in 1854, as per statement	1,822 52
1854—May 3,	commissions on advances	44 56
1854—July 1,	removing iron	171 26
1854—Sept. 2,	removing iron	17 28
1853—Dec. 1,	receiving iron in 1853, 50 cents per ton	1,120 00
1854—June 1,	winter storage	2,240 00
1854—May 2,	receiving iron in 1854	127 50
1854—Dec. 1,	storage from June 1, 1854, to December 1, 1854	2,207 25

1854—Dec. 1, balance of interest	$152 43	
		7,974 26
By charges on 68 tons shipped to Logansport May, 1854.		61 20
Balance due to the plaintiffs as of December 1, 1854 ...		7,913 06

The plaintiffs further say, that said iron still remains in store with them, and that from and after the first day of December, A. D. 1854, so long as the same shall remain in their possession, they should be paid a reasonable compensation for the care and storage thereof; and that as such reasonable compensation they should be paid fifteen cents per ton for each and every month the same shall remain in their care and control, and in the same proportion for parts of a month.

The plaintiffs further say, that as security for the payment of their said charges against said iron, including as well those which have already accrued as those which may hereafter accrue, they have a lien upon said iron; that they are unable to ship the same for the reason that said company neglects and refuses to pay the duties to the United States thereon, as aforesaid, and that said company unreasonably neglects and refuses to pay the plaintiffs their said charges and claims thereon, or any part thereof, although the plaintiffs have often requested them so to do.

The plaintiffs further say, that after said iron came into their possession, they, at the request of said James Pullan, executed to him different warehouse receipts for said iron in substance according to the following form:

Received in store, Toledo, Ohio, for account of James Pullan, —— tons of railroad iron, which we agree to deliver to him or his order hereon, on payment of United States duties, transportation charges, if not already paid, and due dockage and shipping charges.

SMITH & HUNT.

That such receipts were issued as follows:

1853—Dec. 7, for 200 tons.
1854—May 11, for 200 tons.
May 11, for 200 tons.
May 11, for 200 tons.
May 11, for 100 tons.
May 11, for 100 tons.
May 11, for 100 tons.
May 11, for 100 tons.
June 6, for 100 tons.
June 6, for 100 tons.
June 6, for 120 tons.
June 20, for 100 tons.
June 20, for 100 tons.
June 20, for 70 tons.

That on or about the fourteenth day of September, A. D. 1854, the plaintiffs received notice from Messrs. Reeves, Stephens & Co., of

Cincinnati, that they held the assignment of the receipt dated December the 7th, 1853, and requiring the plaintiffs to hold the iron until the presentation of the receipt; that said Reeves, Stephens & Co., is a partnership firm, doing business in said Cincinnati; that the notice aforesaid was given to them, the said plaintiffs, in the partnership name of said firm, and that they, the said plaintiffs, are unable to give the names of the individual members of said firm.

The plaintiffs further say, that on or about the thirteenth day of November, A. D. 1854, they received a further notice from Omar Tousey, of Lawrenceburgh, in the State of Indiana, that he held an assignment of one of said receipts, dated May the 11th, 1854, for one hundred tons; that on or about the 14th day of December, A. D 1854, they received a further notice from Joseph G. Gibbons, of said Cincinnati, that he held an assignment from said Pullan, of another of said receipts, dated May the 11th, for one hundred tons; that on or about the 25th day of October, A. D. 1854, they received a further notice from John A. Duble, of said Cincinnati, that he had purchased one hundred tons of said iron, embraced in another of said receipts, dated May 11th, and directing the plaintiffs not to deliver the same to any person whatever, only on the return of said receipt; and that on or about the 29th day of September, A. D. 1854, they received a further notice from Joseph H. Cromwell, that he held an assignment of two other of said receipts dated May the 11th, each for two hundred tons, which he held as collateral security for the payment of twenty-two thousand dollars; and that on each of said parties so giving the notice to them, the said plaintiffs, as aforesaid, claim to hold the said iron so assigned to them, respectively, as aforesaid, subject to the liens thereon as specified in said receipts; but that said roilroad company has also notified them, the said plaintiffs, that such transfer did not pass the title to said iron, and that the said company was still the owner of the same notwithstanding the assignment of said receipts, and directing them, the said plaintiffs, not to deliver said iron, or any part thereof, to the holders of said receipts.

The plaintiffs further say, that Henry Fitzhugh and DeWitt C. Littlejohn transported said iron from New York to Toledo, as carriers, under a contract with said railroad company for that purpose; that there is due and unpaid to them on account of their charges for such transportation the sum of two thousand five hundred dollars, with interest thereon from the second day of August, A. D. 1854, at the rate of seven per cent. per annum; that as security for the payment of the said charges for transportation so due to said Fitzhugh and Littlejohn, the said company executed and delivered to them a draft of said company on its treasurer in New York, endorsed by other parties as sureties, falling due on said second day of August; that said draft was not paid at maturity, and that being due and unpaid, said Fitzhugh and Littlejohn commenced suit thereon against said company in this honorable court, and in said suit obtained an order of attachment against the property of said company; and that said Fitzhugh and Littlejohn, having in said action made oath that the plaintiffs herein had property of said company in their possession, the sheriff of said county of Lucas did on the 9th day of October,

A. D. 1854, leave with the plaintiffs herein a copy of said order of attachment, with a written notice to appear in said court and make the answer in said proceedings required by law; and that in obedience to said notice they, the said plaintiffs, did at the December term thereof, A. D. 1854, appear and make answer, setting forth the property in their hands belonging to said company as is herein before set forth, subject to the liens aforesaid; that said suit is still pending in said court and undetermined; and that they, the said plaintiffs, are holden therein for the delivery upon the order of the court in said action of said iron, or so much thereof as may be necessary to answer the judgment therein after the payment of the prior liens for duties, storage, transportation, &c.

The plaintiffs further say, that the lien of the United States for the importation duties upon said iron are still unpaid, and that the lien of the United States still exists thereon, and that the amount of the same is $27,327 30, to which should be added the United States inspector's charges on the same, the amount of which are to the plaintiffs unknown.

The plaintiffs further say, that since the delivery of said iron to them as aforesaid, the said Cincinnati, Logansport, and Chicago Railroad Company, in accordance with the provisions of the statutes of the State of Indiana, became and was consolidated with a certain other railroad company of the State of Indiana; and that by virtue of such proceedings for consolidation the two companies so consolidated became and are a new corporation, located and doing business within the State of Indiana, and created by the laws of that State under and by the name of the Cincinnati and Chicago Railroad Company; and that such new corporation, by the operation of said act of incorporation, became and was vested with all and singular the rights and interests of each of said corporations so consolidated, in and to every species of property, of every name, kind, and description by them respectively held at the time of said consolidation; and became and was liable to pay and perform all the debts, liabilities, and duties of each of said companies so consolidated; that by such act of consolidation, the interest of said Cincinnati, Logansport, and Chicago Railroad Company in said iron was transferred to said Cincinnati and Chicago Railroad Company, and that said company now holds the title to the same, subject, however, to all and singular the several liens and claims hereinbefore mentioned in favor of the plaintiffs; and that by said act of consolidation said Cincinnati and Chicago Railroad Company has become liable for and is bound to pay and discharge all the liabilities of said Cincinnati, Logansport, and Chicago Railroad Company to the plaintiffs as aforesaid.

The plaintiffs, therefore, ask for a judgment against said Cincinnati and Chicago Railroad Company for the sum of seven thousand nine hundred and thirteen dollars and six cents, with the interest thereon from the first day of December A. D. 1854, and for such further charges as may accrue for the storage and care of said iron from and after the first day of December, 1854, at the rate of fifteen cents per ton for each month that the same may remain with them, and in the same proportion for part of a month; that the amount of said judgment

may be declared to be a lien upon said iron, and that the said iron, or so much thereof as may be necessary, may be sold under the order of the court, subject to the lien of the United States thereon for duties, and the proceeds applied to the payment of said judgment and the costs, and for other and further relief.

M. R. WAITE,
Attorney for Plaintiffs.

STATE OF OHIO, *Lucas County ss:*

Denison B. Smith makes solemn oath and says: that he is one of the plaintiffs in this action, and that he believes the statements in the foregoing petition to be true. He further says, that said Cincianati and Chicago Railroad Company is a foreign corporation, and that said Omar Tousey is a non-resident of the State of Ohio; that this action relates to personal property in this State, and that said defendants claim some interest therein; and that service of summons cannot be made upon said Cincinnati and Chicago Railroad Company or said Omar Tousey within this State.

DENISON B. SMITH.

Sworn to and subscribed this first day of February, A. D. 1855.

J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Præcipe.

Issue summons to sheriff Hamilton county for James Pullan, John A. Duble, Joseph G. Gibbons, Joseph H. Cromwell, and Reeves, Stephens & Co., returnable according to law. Amount claimed against Cincinnati and Chicago Railroad Company, $7,913 06, with the interest from December 1, 1854; and for the additional charges for storage at the rate of fifteen cents per ton on 2,495 tons of iron, for each month, so long as the same may remain in store after December 1, 1854.

M. R. WAITE,
Attorney for Plaintiff.

Said petition was endorsed as follows: "Process waived and appearance entered, February 1, 1855.

HENRY FITZHUGH,
DE WITT C. LITTLEJOHN.
By M. R. WAITE,
Their Attorney."

Also another Præcipe.

Issue summons against Cincinnati and Chicago Railroad Company, returnable according to law. Endorse amount claimed, $7,913 06, with interest from December 1, 1854; and for additional charges for

storage at the rate of fifteen cents per ton on 2,495 tons of iron, for each month, so long as the same may remain in store after December 1, 1854.

M. R. WAITE,
Attorney for Plaintiff.

And thereupon the following writ of summons was issued from the clerk of the court aforesaid, to wit:

THE STATE OF OHIO, *Lucas County:*

To the Sheriff of the County of Hamilton:

You are hereby commanded to notify James Pullan, John A. Duble, Joseph G. Gibbons, Joseph H. Cromwell, and Reeves, Stephens & Co., that they have been sued by Denison B. Smith and John E. Hunt, Jr., in the court of common pleas of Lucas county, and that unless they answer by the 3d day of March, 1855, (third Saturday after return day,) the petition of the said Denison B. Smith and John E. Hunt, Jr., against them filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 12th day of February, A. D., 1855, (second Monday after date.)

[L. S.] Witness my hand and the seal of said court this first day of February, A. D., 1855.

DENISON STEELE,
Clerk of Court of Common Pleas, Lucas County.

Upon which writ was the following endorsement, to wit:

"Amount claimed against Cincinnati and Chicago Railroad Company $7,913 06, with interest from December 1, 1854, and for additional charges for storage, at the rate of fifteen cents per ton, on 2,495 tons of iron, for each month so long as the same may remain in store after December 1, 1854."

Which said writ was duly returned to said office from whence it issued, on the return day thereof, endorsed by said sheriff as follows:

"1855, February 10. Served James Pullan by copy personally; and Joseph G. Gibbons and Joseph H. Cromwell by copies at their residence; and Reeves, Stephens & Co. by leaving a copy at their usual place of business in Cincinnati; not found as to John A. Duble.

"G. BRASHEARS, *Sheriff.*
"By WILSON SUFFIN, *Deputy.*"

And, therefore, on the third day of February, A. D., 1855, a certain other writ of summons was issued from the clerk's office aforesaid, to wit:

THE STATE OF OHIO, *Lucas County:*

To the Sheriff of the County of Lucas:

You are hereby commanded to notify the Cincinnati and Chicago Railroad Company *et al.*, that they have been sued by Denison B.

Smith and John E. Hunt, jr., in the court of common pleas of Lucas county, and that unless they answer by the 3d day of March, 1855, (third Saturday after return day,) the petition of the said Denison B. Smith *et al.* against them, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 12th day of February, A. D., 1855,(second Monday after date.)

[L. S.] Witness my hand and the seal of said court this third day of February, A. D., 1855.

DENISON STEELE,
Clerk of Court of Common Pleas, Lucas County

Upon which writ was the following endorsement of claim, to wit:

"Amount claimed, $7,913 06, with interest from December 1, 1854, and for additional charges for storage, at the rate of fifteen cents per ton, on 2,495 tons of iron, for each month so long as the same may remain in store after December 1, 1854."

Which said writ was duly returned to said office from whence it issued, by said sheriff, on the return day thereof, endorsed as follows by said sheriff:

"I received this writ February 3, 1855, at 10 o'clock, A. M., and served the same by delivering a copy to Caleb B. Smith, the president of the Cincinnati and Chicago Railroad Company, and the managing agent thereof within this State, on the 3d day of February, 1855.

"E. DODD, *Sheriff.*"

And afterwards, to wit, on the 14th day of March, A. D. 1855, the said Cincinnati and Chicago Railroad Company, by their attorneys, filed in the clerk's office aforesaid, their answer to said petition, (which answer was placed on file by consent of plaintiffs' attorney,) and is as follows, to wit:

Denison B. Smith and John E. Hunt, plaintiffs, *vs.* The Cincinnati and Chicago Railroad Company, James Pullan, ag't.	Court of Common Pleas, *Lucas County, Ohio.*

Answer.

The Cincinnati and Chicago Railroad Company, one of the defendants in the aforenamed cause, comes, and for answer to said petition says: That it is not true as alleged in the petition that said company, by James Pullan, agent, agreed to pay said plaintiffs one dollar for each and every ton of said iron which said plaintiffs should store through the winter of 1853–4, and until the opening of navigation in the spring of 1854, and no contract was made by said company for the payment of any specific sum for the storage of said iron.

The said plaintiffs very urgently solicited the said company to give them the business of receiving, storing, and forwarding said iron, and

proffered to do the same and all services connected therewith, as low as the same could be done by any other person or persons whatever, and said defendants allege that said plaintiffs, as commission and forwarding merchants, were bound to render all the services specified in their said petition for a fair and reasonable compensation.

Said defendants allege that the charges of said plaintiffs for receiving, handling, and storing said iron, are exorbitant and excessive. They further allege that one dollar per ton would be a fair and just compensation for receiving the said iron, piling the same, and holding it in store for the term of one year, and a proportionable rate for any longer time; wherefore, said defendant claims that said plaintiffs are not entitled to said sum of $7,913 06, and ask judgment accordingly.

HILL & PRATT,
Attorneys for C. & C. R. R. Co., Defendant.

STATE OF OHIO, *Lucas County:*

Caleb B. Smith makes oath that he is president of the Cincinnati and Chicago Railroad Company, defendant herein, and that he believes the facts stated in the foregoing answer to be true.

CALEB B. SMITH.

Sworn to and subscribed before me this 14th day of March, 1855.

HENRY L. HOSMER,
Notary Public, Lucas county, Ohio.

And afterwards, to wit, on the 5th day of July, A. D. 1855, (being during the term of court first aforesaid,) said Cincinnati and Chicago Railroad Company, by its attorney, filed in the clerk's office aforesaid, a certain amended answer, as follows, to wit:

Smith & Hunt, plaintiffs, *vs.* Cincinnati and Chicago Railroad Company *et al.*, defendants.	Court of Common Pleas, *Lucas County, Ohio.*

Amendment to answer.

Said Cincinnati and Chicago Railroad Company, for further answer to plaintiffs' petition, say: that on the 18th day of April, 1853, and before the consignment to by defendant, or the receipt by plaintiffs of any portion of the iron in their petition set forth, the said plaintiffs, in reply to a letter addressed to them, wrote T. J. Elliott, an agent of said defendant then acting as such in the city of New York, a letter in the words and figures following, that is to say:

TOLEDO, OHIO, *April* 15, 1853.

DEAR SIR: We have your favor of a late date, and we have also received a letter from Mr. Tefft, who is agent of our line, none of them in New York. He says you will have about 2,000 tons of iron to go to Logansport in July, and wants our price from here. We have said to him, as we now say to you, that we will transport it from here including our charges, at $2 45 per ton. If you can find

a line there that will carry the iron to Toledo on favorable terms, consign it to us, and we will carry it out; but should wish to know in the meantime.

We are disappointed in not getting your entire lot, which we should likely have been able to receive, had we known you would have shipped via Oswego. Shall we hear from you in a day or two?

Respectfully yours,

SMITH & HUNT.

T. J. ELLIOTT, Esq.,
Care of C. J. Stedman, Esq.,
62 *Liberty street, New York.*

That said iron was sent to plaintiffs, and consigned by defendant on the faith of said proposition, so made to them by the plaintiffs, and in full reliance upon the carrying the same out by the plaintiffs; and defendant alleges that said plaintiffs became bound upon the receipt of said iron to carry out and perform the agreements therein contained, and do all the services and transport said iron for the compensation therein named.

And afterwards, to wit, on the 13th day of July, A. D. 1855, (being during the term of the court first aforesaid,) said plaintiffs, by leave of the court first had and obtained, filed in the office of the clerk of said court a certain supplemental petition in the words and figures following, to wit:

COURT OF COMMON PLEAS, LUCAS COUNTY.

DENNISON B. SMITH and JOHN E. HUNT, jr., plaintiffs, *vs.* THE CINCINNATI AND CHICAGO RAILROAD COMPANY *et al.*, defendants.

Supplemental Petition.

The plaintiffs say that since the commencement of this suit, other and further charges have accrued to the plaintiffs for the storage of the iron in the petition mentioned, and that they are entitled to a reasonable compensation for the care and storage thereof; that such reasonable compensation will be fifteen cents per ton for each and every month from the time of the commencement of this suit until the 15th day of May, A. D. 1855, which amounts to $934 72. Wherefore plaintiffs ask that, in addition to the amount due to them for the care and storage of the property up to the time of the commencement of this suit, and other charges, as set forth in said petition, they may have judgment against said railroad company for said sum of nine hundred and thirty-four dollars and seventy two cents, ($934 72,) and that they may be decreed to have a lien for the same, as for the other charges in said petition set forth, and that the same may be enforced in like manner as is asked for in said original petition.

M. R. WAITE,
Attorney for plaintiff.

STATE OF OHIO, *Lucas County:*

Denison B. Smith makes solemn oath and says that he believes the statements set forth in the foregoing supplemental petition to be true.

DENISON B. SMITH.

Sworn to before me and signed in my presence, July 13, 1855.

W. H. HICKOK,
Deputy Clerk of Lucas Common Pleas.

And afterwards, to wit, at the same term of the court first aforesaid, to wit, at the July term thereof, begun and held on the 2d day of July, A. D. 1855, came the plaintiffs, by their attorneys, and the said defendant, the Cincinnati and Chicago Railroad Company, by its attorneys; and thereupon came a jury, to wit: Matthew Brown, Charles Ballard, Asa W. Maddocks, Ezra Bliss, Roger W. Church, George Spencer, Richard Greenwood, Richard Walker, John F. Terry, John F. Schureman, William C. Cheney, and James R. Thompson, who were duly empanelled and sworn the truth to speak upon the issues joined between the parties; and by agreement of the parties made in open court, the jury were required in their verdict to state their finding upon each of the items of the accounts between the parties, and also to state the amount which they found to be due to the plaintiffs on account of the several matters set forth in said petition, including compensation for the storage of said iron up to the 1st day of February, A. D. 1855; and also to set forth and state in their verdict the amount of compensation to be paid to said plaintiffs for storage on each ton of iron for each and every month that the same should remain in their possession and under their care after the commencement of this suit.

And thereupon said jury returned to the court their verdict as follows:

Services rendered.	Amount.	Interest to February 1, 1855.
1853, December 20, balance of advances	$70 46	4 67
1854, May 3, amount of advances	1,822 52	81 03
Commission on advances	45 56	
Receiving 2,240 tons of iron in 1853, at 42 cents	940 80	
Receiving 255 tons of iron in 1854, at at 42 cents	107 10	
Storage of 2,240 tons of iron, from December 15, 1853, to February 1, 1855, (13½ months,) at $15 per month	4,536 00	
Storage of 187 tons of iron, from June 1, 1854, to February 1, 1855, (8 months,) at $15 per month	224 40	
Balance of interest	83 26	
	7,830 10	85 70
CR.		
May 4, by charges on 68 tons shipped to Logansport	61 20	2 44
	7,768 90	83 26

We, the jurors in the above case, find for the plaintiffs in the sum of seven thousand seven hundred and sixty-eight dollars and ninety cents. We also find for the plaintiffs that a reasonable compensation for storage of the iron on their dock from February 1, 1855, is at the rate of fifteen cents per ton for each month until removed.

Whereupon the defendant, the Cincinnati and Chicago Railroad Company, moved the court to set aside said verdict and grant a new trial for the following reasons, to-wit:

First. That the verdict is against the weight of evidence.

Second. That the damages allowed by the jury are excessive.

Which motion was overruled by the court.

And on consideration thereof it is ordered, adjudged, and decreed that said defendants, within ten days, pay or cause to be paid to said plaintiffs said sum of $7,768 90, and the interest thereon from the first day of February, A. D. 1855, and all the costs of this suit; and in default of said payment, that said iron in said petition described, or so much thereof as may be necessary, be sold by the sheriff of this county as upon execution at law, subject to the lien of the United States thereon for duties, as set forth in said petition; and that the proceeds of such sale be applied as follows:

First. To the payment of the costs of this suit taxed at $42 94.

Second. To the payment of the amount found to be due to the plaintiffs as aforesaid up to the first day of February, A. D. 1855, with the accruing interest thereon.

Third. To the payment of the amount which may be found to be due to the plaintiffs for the care and storage of said iron from and after the first day of February, A. D. 1855, at the rate of fifteen cents per ton for each and every month that the same may remain in the possession and under the care of the plaintiffs after that time.

And inasmuch as the court are not advised of the length of time the said iron has remained, or may remain, in the possession of said plaintiffs since the first day of February, A. D. 1855, by consent of said plaintiffs and said defendant, the Cincinnati and Chicago Railroad Company, this cause is referred to E. D. Nye, esq., as special master commissioner to ascertain and report to the court at its next term the amount of tons of iron which have remained in the possession and under the care of the plaintiffs since said first day of February, A. D. 1855, and the time the same has so remained in their possession, or may so remain.

And this cause is continued until the next term of this court to receive and act upon said report of said master.

Before the trial of this cause the plaintiffs discontinued their suit as to Omar Tousey and John A. Duble, and said Fitzhugh & Littlejohn appeared by their attorneys and disclaimed all interest in the subject-matter of this suit.

Defendant, Cincinnati and Chicago Railroad Company, gives notice of appeal to district court, and the court fix the amount of bail to be given to perfect said appeal at $10,000.

THE STATE OF OHIO, *Lucas County:*

I, Francis L. Nichols, clerk of the court of common pleas in and for said county of Lucas, do hereby certify that the foregoing is a full and true copy of the record of proceedings and judgment made and entered by said court in the foregoing cause, as appears from the books and papers now in my office.

[L. S.] Witness my hand and the seal of said court this 21st day of July, A. D. 1855.

F. L. NICHOLS, *Clerk.*
W. H. HICKEY, *Deputy.*

Costs of suit	$42 92
This record	8 00
	50 92

I, John Fitch, presiding judge of the court of common pleas within and for the county of Lucas and State of Ohio, do certify that Francis L. Nichols is and was at the time of the attestation aforesaid clerk of said court; that Walstein H. Hickey was deputy clerk of said court, and that the attestation aforesaid is in due form of law.

JOHN FITCH, *Judge.*

Dated TOLEDO, *July* 21, 1855.

DECEMBER 13, 1858.

DEAR SIR: Herewith I hand you transcript of the record in your suit against the Cincinnati and Chicago Railroad Company. You will perceive that Mr. Nye has never made a report. The reason for this omission is, that there seemed no necessity for incurring the additional expense so long as it would not be possible for you to enforce your lien upon the iron, it having been removed from your possession by Mr. Wright under his proceedings. A general claim against the company we did not consider of sufficient value to justify any further expense in the action.

M. R. WAITE.

D. B. SMITH, Esq.

That the regular charges for the transportation of iron from Toledo to Logansport at the date of said letter, and at the time of the receipt of said iron by plaintiffs, was from one dollar to one dollar and fifty cents per ton, besides tolls, which were 9½ cents per ton; and that the balance of said sum of $2 45 per ton, would, by the terms of said letter, have been all that plaintiffs would, have received for receiving and re-shipping said iron, and all other services by them to have been performed, and is all that they have any right to charge or can recover against the defendant in this action.

HILL & PRATT, *Attorneys.*

STATE OF OHIO, *Hamilton County, ss:*

Daniel B. Leepton, secretary to the said department, the Cincinnati and Chicago Railroad Company, makes oath and says that the foregoing answer is true, as he verily believes.

D. B. LEEPTON.

Subscribed in my presence and sworn to before me this 2d day of [L. S.] July, A. D., 1855.

SAMUEL STOTSER, JR.
Notary Public.

STATE OF OHIO, *Hamilton County, ss:*

In the case of Denison B. Smith *et al. vs.* The Cincinnati and Chicago Railroad Company *et al.*, Daniel B. Leepton, secretary of said company, one of the defendants in said suit, makes oath and says, that the letter, a true copy of which is set forth in the amended answer of said railroad company hereto attached, was addressed by said plaintiffs to said Elliott, and by him received as agent and director of said company soon after its receipt; that at the time of the commencement of this action, at the time of the filing of the original answer therein, and until after the adjournment of the March term of this court last past, and within a short time heretofore, said letter was in the possession of Williamson Wright.

That said company, and the managing officers of said company, were wholly unaware of the existence of said letter; or, if any of said officers supposed any correspondence of a similar nature had taken place between the plaintiffs and any agent or officer of said company, they were wholly unadvised as to the terms of said correspondence, or the nature of any contracts or agreements thereby entered into; but affiant says that the said letter and the contract therein contained have been by said company ascertained, and by the acting officers of the same, discovered since the adjournment of the last term heretofore of this honorable court.

D. B. LEEPTON.

Subscribed in my presence and sworn to before me this 2d day of [L. S] July, A. D. 1855.

SAMUEL STOTSER, JR.,
Notary Public.

D.

Additional Evidence.

STATE OF OHIO, *Lucas County, ss:*

I, William Baker, being duly sworn, say, that as an attorney at law, I was to some extent connected, professionally, with a dispute between Denison B. Smith and John E. Hunt, jr., of the one part, and the Cincinnati, Logansport, and Chicago railroad company and

John W. Wright, of the other part, in relation to a quantity of railroad iron bought for said company and on which said Smith & Hunt claimed charges, in which proceedings, the iron was finally taken away through the aid of the customs department. Said Wright and his associates had the contract for laying the iron on the road, the precise terms of which I cannot state; but Wright was very anxious to forward the iron with despatch, and was the active man in the measures that were taken to accomplish it. It is a matter of common notoriety that said railroad company is insolvent, and suits are now pending to foreclose some of the mortgages given on it. The stock and the inferior classes of its bonds are worthless, or nearly so. Wright is also understood to be insolvent for all practical purposes.

W. BAKER.

Subscribed in my presence and sworn to before me this seventeenth day of February, A. D. 1859.

J. M. GLOYD,
Notary Public, Lucas county, Ohio.

STATE OF OHIO, *Lucas County, ss:*

Horace S. Walbridge, of Toledo, Ohio, makes oath and says, that he is familiar with the organization known as the Cincinnati, Logansport and Chicago Railroad Company, and the Cincinnati and Chicago Railroad Company, which are one and the same company; that he knows John W. Wright, of Logansport, Indiana; that it was commonly known and believed that said railroad company were insolvent and worthless in 1855, and that they are so now; that their bonds, to a large amount, have since that time been sold as low as five cents on the dollar; that it is impossible, and has been since 1854, to make any collections of said company by law; that said John W. Wright, and others acted, in 1855, as the agents of said railroad company in removing a large quantity of railroad iron from the possession of Smith & Hunt, of Toledo, Ohio, under bonds to go to Evansville, Indiana; that he has understood and believes that said Wright is insolvent, and that he has been so for years past.

H. S. WALBRIDGE.

Subscribed in my presence and sworn to before me this seventeenth day of February, A. D. 1859.

J. M. GLOYD,
Notary Public, Lucas county, Ohio.

STATE OF OHIO, *Lucas County, ss:*

Josiah Riley, of said Lucas county, makes oath and says, that he was collector of the port of Toledo, in said county, from May, A. D. 1853, to May, A. D. 1857; that in 1855 John W. Wright, as agent of the Cincinnati, Logansport, and Chicago Railroad Company, duly authorized by said company, made application for the withdrawal from warehouse of a large quantity of railroad iron belonging to said company, upon which Smith & Hunt, of Toledo, Ohio, had charges for transportation and storage; that said Smith & Hunt informed him that they had claims against said property, and that they should

resist the attempt at removal by civil State process, and that they, the said Smith & Hunt, caused the said property to be attached by the sheriff of said Lucas county; that he referred the case to Mr. Guthrie, Secretary of the Treasury, and was instructed by him to deliver said iron to said agent of said company for transportation to Evansville, Indiana, and to call on the United States district court for the necessary action to retain or recover possession of said property; that before the withdrawal of the iron for transportation, said Smith & Hunt made a tender to him of the duties on said iron, which he declined to receive; that the sheriff of Lucas county also tendered to him the duties on said iron when the same was attached by him; that circumstances induced affiant to question said Wright's intention to take said iron to Evansville, as represented, and on notifying him to that effect, he, the said Wright, made oath in writing that he did intend to take it to Evansville, unless released from his obligation to do so by the Secretary of the Treasury.

JOSIAH RILEY.

Subscribed in my presence and sworn to before me this seventeenth day of February, A. D. 1859.

J. M. GLOYD,
Notary Public, Lucas county, Ohio.

E.

Statement of collector of Toledo.

TOLEDO, *September* 2, 1857.

The undersigned was collector of the port of Toledo from the first day of May, 1853, to the first of May, 1857.

During that time about four thousand tons of railroad iron belonging to the Cincinnati, Logansport, and Chicago Railroad Company were brought into the district, and were housed on docks owned or leased by Messrs. Smith & Hunt, of Toledo. Messrs. Smith & Hunt signed the warehouse bonds for several of the cargoes of this iron.

The iron was not placed in bonded yards, but was bonded on their docks, in accordance with special instructions or permission from the Secretary of the Treasury, applying to all iron at that time warehoused at this port. For the greater portion of this time I held the warehouse receipts of Messrs. Smith & Hunt, which were taken by me as additional security for the government.

In the month of April or May, 1855, application was made to me by John W. Wright, of Logansport, agent for the company named, to enter this iron for transportation under the United States warehouse laws and the circular instructions of the Treasury Department, to Evansville, Indiana. The transportation bonds were issued in due form, and two or three hundred tons were delivered, when I was informed by Mr. D. B. Smith, of the firm of Smith and Hunt, that a fraud was being committed by the agent of the company on the government by their directing the iron from its destination, and stoppin

it at Logansport, Indiana, for the purpose of using it there in the construction of the company's road. My attention being called to the fact that other boats by which the iron was to be forwarded were engaged to go only to Logansport, I stopped its shipment, enclosed a statement from Mr. Smith to the Secretary of the Treasury, and telegraphed the facts to the Secretary at Washington; and in reply received a telegraphic dispatch from the acting Secretary, P. G. Washington, directing me to stop the shipment of the iron. I did so, and telegraphed to J. W. Wright, who was at Cincinnati, that I had stopped its shipment, and gave my reasons; to which he telegraphed in reply that it was his intention to transport the iron to Evansville, unless excused by the government, and that he had made and sent me his affidavit to that effect. This affidavit I received a few days afterwards by mail.

A short time after I received the dispatch from the acting Secretary, I received a letter from the Secretary of the Treasury, directing me, on the execution of satisfactory bonds, to permit the agents of the company to withdraw the iron for transportation to Evansville. Messrs. Smith & Hunt having obtained a judgment against the company for charges on the iron, it was levied on by their direction by the sheriff of Lucas county, Ohio, who offered to pay the duties, and demanded possession.

The whole case was laid before the Secretary, and I was instructed to deliver the iron to the agents of the company, and prevent the sheriff from obtaining possession, even if it should be necessary to use force for that purpose.

Before the iron was levied on, I was informed by Messrs. Smith & Hunt that they had a claim for charges, and they at that time offered to pay the duties and all United States charges if I would give them possession. I refused to give them possession, or to receive from them the duties.

The iron was all diverted from its destination, as Mr. Smith said it would be, and, by order of the Secretary, I seized it and held it in my possession about four weeks, when, on his order, I released it to Mr. Wright, the duties having been previously paid.

These are the leading facts of the case, so far as my memory serves me in recalling them. They can be ascertained more definitively by an examination of the records.

Respectfully,

JOSIAH RILEY.

E. E.

Letter of D. B. Smith.

TOLEDO, *May* 9, 1855.

SIR: I address you without the pleasure of an acquaintance, since I am sure the occasion furnishes a sufficient guarantee, and since I am assured by my father-in-law, General J. E. Hunt, postmaster here, of a respectful consideration for my letter.

Josiah Riley, Esq., collector of this port, has no doubt handed you my note to him, of a recent date, respecting the shipment of a quantity of railroad iron for the Cincinnati, Logansport, and Chicago Railroad Company, *hence to Logansport, Indiana, which had been bonded to go to Evansville, Indiana.* In that note I gave Mr. Riley some reasons why the iron should not be shipped under those bonds, and now I have concluded to give the department a history of the whole business.

Over a year and a half since I commenced receiving the iron for this railroad company, under the expectation that the iron would go immediately forward to Logansport; but about that time some financial troubles prevented their raising funds to pay duties and transportation charges, and I have been compelled, at great inconvenience and expense, to hold the iron here on hired docks until the present time. The company have been and are now unable to pay me a dollar for my transportation and expenses I have incurred, or for my storage charges.

They have secured the services of John W. Wright, of Logansport, Indiana, a resolute and unscrupulous man, to carry out their ends, and, no doubt, agree to justify the means. Mr. Wright enters bonds to transport the iron to Evansville, Indiana. He has shipped a few hundred tons of it to Logansport, Indiana, where it is unloaded from the canal boats, and where it is to be laid down on the track in pursuance of a contract between Wright and the company, &c.

I beg the department will insist upon payment of duties here, and, if so, I can collect my pay.

Yours, &c.,

DENISON B. SMITH.

Hon. PETER G. WASHINGTON,
Treasury Department, Washington, D. C.

F.

Letter of the Secretary of the Treasury to Hon. John Cochrane.

TREASURY DEPARTMENT, *January* 27, 1859.

SIR: I have the honor to acknowledge your letter of the 11th instant, enclosing for my opinion the petition and evidence of D. B. Smith and John E. Hunt, jr., "for payment of transportation on railroad iron held by them at Toledo, Ohio," as stated therein, and requesting me to inform the committee how far the allegations contained in the petition are borne out by records in the department.

This claim was presented here by D. B. Smith, esq., in 1857, upon the statement of facts herewith enclosed. It will be observed that the prominent ground on which the claim was then based was the right of Smith and Hunt, as warehousemen with whom the merchandise had been stored, to enter it for consumption at Toledo, pay the duties thereon, and thus retain it in their possession. As the collector refused to receive such entry from them, or accept their offer of the duties, and allowed it to be taken out of their possession upon transportation entry and bond to Evansville, by which they lost their lien on the merchandise, they claimed that the United States were bound

to pay their charges thereon. My decision upon this claim, explaining the rights of parties other than the owners to enter and pay duties on merchandise, and containing the opinion of this department on the general question of lien upon property under the permanent control of the United States for payment of duties thereon, is contained in the letter of the 27th of October, 1857, among the papers transmitted by the committee, with a memorial attached stating by mistake that it was written by the solicitor. It was, in fact, drawn up under my direction, after a full investigation in my office. By examination of that letter it will be seen that my opinion was, that Smith & Hunt had no just claim upon the United States, as no public officer had taken any step in authorizing the transportation of this merchandise from Toledo except such as was required by law.

Their petition to Congress, enclosed by you, appears to ground the claim upon the fraudulent conduct of the Cincinnati, Logansport, and Chicago Railroad Company, and upon an alleged change of practice by my predecessor in transporting merchandise in bond, by which their lien was lost.

As to the former, this department nor any of its officers had any jurisdiction over the contract between Smith & Hunt and the railroad company. The law gave the latter the option to enter the iron for consumption at Toledo and pay the duties there, or to enter it for transportation in bond to some other port, and carry it away from Toledo. Had the department been satisfied that the company intended to exercise their option in such a manner as to take away the lien of Smith & Hunt, it had no power to prevent them from transporting the iron from the port of Toledo to another port, in giving the bonds required by the regulations under the warehouse laws. Mr. Smith, in his letter to the department dated May 9, 1855, a copy of which is among the papers transmitted, requested that the payment of the duties on this iron should be enforced at Toledo, upon which the assistant secretary immediately replied, on the 14th of May, 1855, that the department could not interfere between himself and the company in the case stated. A copy of this letter from the department to Mr. Smith, showing that he was fully apprised at the time by the department of its want of jurisdiction over the contract between him and the company, is herewith enclosed, (marked A.)

Several cases have been presented where individual embarrassment arising from the failure of railroad companies have appealed to my sympathy, but the department has been always compelled to decide that it had no power to interfere with contracts for railroad iron charged with duty. It cannot change the revenue laws to relieve individuals from losses by the violation of such contracts, where they overlooked the necessary provisions for their security. Had Smith & Hunt adopted the ordinary precaution to indemnify them for advances and expenses, of requiring the delivery and assignment of the title papers of the iron, or so much as was required for their security, then they could have enforced the alleged contract for entering the iron for consumption at Toledo by so entering it themselves. I do not think the United States should be made responsible for losses consequent upon their neglect of exacting proper security from the company for the compli-

ance with their contract as alleged. In regard to the other point stated in the petition, alleging a change of practice by my predecessor as having occasioned the loss of their lien on the iron in question, there are so many mistakes in the statement that they can be best explained by transcribing that portion of the petition. It states: "This law, which your memorialists understand began first to be enforced by Mr. Guthrie, secured to the importers the control of their goods without regard to charges, and the further right to transport them from one port to another. It further kept such goods in the legal custody of the revenue law and officers until the duties were paid and the goods delivered; whilst prior to his incumbency a practice prevailed, when goods were to be transported in bond, of delivering them to the importers or their agents, and looking alone to the transportation bond for the duties.

"And your memorialists claim and maintain that whenever a government, and especially a just and parental one like this, finds it necessary, in carrying on its just policy, to enact a vigorous law, or put in force one, hitherto disregarded, which shall materially interfere with the ordinary rules of dealing between individuals, and thereby inflict great loss upon a citizen, it is bound by every principle of equity and fair dealing to repair such injury and recompense such loss."

The power of importers over their merchandise which enables them to transport it from one port to another without regard to charges, was not introduced into our revenue system by Mr. Guthrie, but by the warehouse law of 1846, enforced in detail by the circular instructions issued by Mr. Walker, then Secretary of the Treasury, on 14th August and 30th September, 1846, and the 17th February, 1849. Until the passage of that act dutiable merchandise could not be carried from one port to another unless the duty was previously paid thereon. Further provisions were added by act 28th March, 1854, and enforced by the circular of Mr. Guthrie of 30th March, 1854. Nothing was done in regard to the iron in question under the last named act, the right of transportion in bond away from Toledo having been clearly given by the act of 1846.

From the establishment of our system of import duties on foreign merchandise, it has always been held that paramount control over the custody of such merchandise belonged to the United States and their officers until the duty shall be paid. The Supreme Court of the United States decided many years since that no attachment upon judicial process, except at the suit of the United States, nor any other lien, lawfully could interfere with such paramount custody of the United States. The act of 1846 did not provide that merchandise should be transported from port to port by the United States; but it contemplated the delivery of the merchandise to the owners or their agents by transportation under bond at their own expense, it still remaining under the paramount control of the United States until the duty should be paid. Prior to the incumbency of Mr. Guthrie, goods were delivered to the importers or their agents by transportation under bond; continued to be so delivered during the whole of his incumbency, and are

now daily delivered in the same manner. No change in this respect appears to have been made during the incumbency of Mr. Guthrie, as stated in the petition.

By his letter of the 18th May, 1855, the collector of Toledo informed the department that a dispute had arisen between Smith & Hunt and the railroad company, in regard to the charges of the former on this iron, and their claim against it on that account, and requested instructions on the subject. On the 26th May he apprised the department, by telegraph, that this iron, or a portion of it, had been attached by the sheriff at the suit of Smith & Hunt for the purpose of preventing it from being carried away from Toledo under entry for transportation under bond. On the 28th May, the collector was directed by letter—a copy of which is among the papers—that unless the sheriff withdrew his attachment of the iron, so that the control of the United States over it would be undisputed, he must take the proper steps to cause the proceedings to be carried to the circuit court of the United States in order to establish the lawful right of the United States over the iron. This direction appears to have been given to enforce the general principle of the revenue laws, that no interference with the control of the United States over merchandise subject to duty could be permitted before the duties were paid. This attachment by the sheriff appears to have been relinquished, and the iron went forward under the transportation bond.

If the statement in the petition is intended to mean that prior to the incumbency of Mr. Guthrie a practice prevailed when goods were to be transported in bond and delivering them to the importers or their agents *for consumption* without entry and payment of duty, as required by law, and looking alone to the transportation bond for the duties, I can only say that occasional abuses and violations of the law in laying down railroad iron without entry for consumption no doubt occurred prior to the incumbency of Mr. Guthrie; and I regret to add that this abuse has not entirely ceased up to this time, notwithstanding the most strenuous exertions of this department to correct and prevent it.

It has been requested in behalf of the petitioners that such evidence of this practice as is shown by our records may be submitted to your committee; and in compliance with this request I herewith enclose copies of letters addressed to several surveyors of the customs on this subject, with the answers of such of them as show the existence of this violation of the law, marked B, C, D E, F, and G, respectively. I also enclse a letter just received from the surveyor at Dubuque of the 12th instant, in answer to inquiries respecting iron transported under bond from New York to that place, by which it appears that the abuse referred to in the petition has not entirely ceased up to the present time, marked H.

That prior to the incumbency of Mr. Guthrie, and since, a practice has prevailed of looking alone to the transportation bond for the duties is a statement obviously founded upon a misapprehension of the mode of transportation under bond provided by the act of 1846. The bonds are executed at the port at which the merchandise is entered for transportation, and remain in the charge of the collector there, unless delivered by him to the district attorney for prosecution for breach of condition; but the duty is payable on the merchandise, when entered

for consumption, either at the port to which it is first transported under bond, or at some other port to which it may be further transported under bond. These bonds do not, therefore, come into the possession of the collectors where the duties on such merchandise is payable, and of course cannot be looked to by them for the payment of the duties as stated. Admitting, however, that transportation bonds are intended to secure the duty, it is impossible for me to comprehend how this circumstance would have enabled Smith & Hunt to enforce their lien entries here unless it is shown that the execution of such bonds discharged all the claim of the United States upon the merchandise *in rem* for the payment of duty. Whether such transportation bonds released the merchandise from the claim of the United States for the duty thereon they had an opportunity to have judicially decided by insisting upon their attachment, instead of directing its withdrawal by the sheriff. Having admitted by such withdrawal the paramount control of the United States over the iron until the duty was paid, the railroad company were enabled to deprive Smith & Hunt of their lien on the iron without their consent, simply by exercising the election given by law to the owner of merchandise to take it out of warehouse at Toledo for transportation to some other port after being transported away from Toledo under bond as authorized by the act of 1846, which this department, as has been stated, had no power to prevent. Smith & Hunt lost their warehouse lien upon this iron, and could only resort to the usual remedies given by law for the enforcement of their contract with the railroad company. There was therefore no interference by the United States or their officers with the ordinary rules of dealing between individuals in this case, except the paramount control which the revenue laws have always given to the United States over merchandise upon which duty has not been paid. The loss they allege was occasioned not by such interference, but by the absence of the necessary precautions for their own security. It is obvious that so long as the paramount control of the United States over this iron subsisted in consequence of the non-payment of the duties thereon, whether the alleged practice before the incumbency of Mr. Guthrie to look to the transportation bonds alone for the duties existed or not, Smith & Hunt could not have lawfully enforced their lien upon it.

After careful investigation of the facts, this claim has been found to present the simple question, whether merchandise subject to duty, placed in private warehouse under bond, can be taken out of warehouse by entry for transportation to another port against the consent of the warehouse man without making the United States responsible to the latter either legally or equitably for the amount of his charges on such merchandise.

This question is one of great extent and importance in view of the vast amount of dutiable merchandise in private warehouse under bond in various sections of the United States. The whole of this merchandise is subject to be entered for transportation to other ports are under bond at the option of its owners. If the United States either legally or equitably bound in any event for the warehouse charges on this merchandise, the facilities conferred by the acts of 1846 and 1854 will either require modification, or a very severe burden

be imposed on the treasury. The want of information on the part of Smith & Hunt that the merchandise could be lawfully taken from their warehouse custody against their consent, seems to be the only special circumstance which distinguishes their claim from thousands of others; and how far such distinction can be practically applied is matter of opinion. It is clear that the principle that the United States are to be held responsible for warehouse charges on bonded merchandise under any circumstances, would be a vital innovation upon the present system of warehousing merchandise.

In reply to the inquiry, how far the allegations of the petition are borne out in the records of the department, I beg leave to state that a great variety of matters are referred to in the narrative as having occurred between Smith & Hunt and other parties, and which the records here furnish no information. Only such transactions as led to application here are referred to in our records. Copies of all that appear to have any bearing upon the claim are either among the papers received from the committee, and are herewith returned, or have been added, and are specially referred to herein.

Very respectfully, your obedient servant,

HOWELL COBB,
Secretary of the Treasury.

Hon. JOHN COCHRANE,
Chairman of the Committee on Commerce, House of Representatives.

Smith & Hunt's reply to the Secretary of the Treasury.

Smith & Hunt's memorandum of points of argument in their case in Congress.

Bonded laws of the United States permit owners of merchandise and transporters to contract together for transporting merchandise in bond for duties into the interior. Transporters have no interest, and are not benefited thereby, but government avails itself of their facilities in working out its policy and laws. It is fair to claim, in return, a proper protection of their rights, surely, that the government will do no oppressive act.

Smith & Hunt agreed to receive at Toledo and ship to Logansport, Iowa, four thousand tons of railroad iron which had been imported and was owned by the *Cincinnati, Logansport, and Chicago Railroad Company*. Smith & Hunt paid transportation and incurred other charges under a *positive agreement* of the company and the implied agreement of the United States, that the duties were to be paid at Toledo and the lien of the United States released. These charges were all incurred in strict conformity to custom all over the United States. These facts and those of subsequent occurrence, imposed an obligation upon government to do *one of three things*, viz: To receive its duties at Toledo and release its lien, or permit Smith & Hunt to collect their charges of the company, or permit *them* to forward the iron to Evansville, in bond, *subject to their charges*, as it had been forwarded to them from New York. This point is avoided in all letters from the department, viz: If Smith & Hunt had been permitted to

make *their bill of lading for every shipment of the iron, and take receipts of the masters of canal boats for the same, with agreement to deliver, and with their charges per ton noted thereon*, all of which is precisely the custom, then the boats would have delivered the iron at Evansville, and after payment of duties the warehouseman or agent there would have collected charges. *This*, then, is the "way in which Smith & Hunt would have collected their charges."

Instead of doing thus, government, with full knowledge of the unlawful intentions and acts of the company, *compelled Smith & Hunt to deliver the iron directly into the possession and hands of the owners.* The two ways of doing the business are very unlike. These owners had *their own boats*, and taking the iron into possession, loaded them and sent them whither they pleased. The writer of the letter from the Treasury Department to committee has no proper conception of the method by which these laws are carried out in detail.

Smith & Hunt contend, that by this process the iron was *withdrawn for consumption* in the meaning of the act of 1854, and which could not properly be done without payment of duties.

The Treasury Department had full knowledge that the railroad company would take the iron at once to *Logansport*, where it was entered at Toledo to go, and that it would not be taken to another *collection district;* and with that knowledge it was wrong to move a bar of it until the duties were paid.—(See Smith's letter to Secretary of Treasury, May, 1855.)

We claim it is *no "neglect"* on our part that we took no "assignment of title papers" for our security. Such a thing is unknown and unheard of in business of the kind, except in cases of lending money on merchandise in bond as collateral security. Thousands of tons of merchandise are transported yearly from Europe and the Canadas, and placed in transportation and warehouse bond, and no one ever heard of such a necessity, and it is impossible to put such a rule in practice. We have neglected nothing. We have resorted to every known method to collect our charges, and as a last resort we made an attempt to secure ourselves by the laws of our State, but not until every other method had failed.

There is no such mistake in our memorial as the writer of the letter attempts to show by a quotation. The documents furnished by himself to the committee fully establish the point we made, viz: that under the laws of 1846 the practice was common to *deliver the goods and rely upon the bond* for the duties, and that under the law of 1854 making *double the duty the penalty* for non-delivery of the goods transported or warehoused the practice was changed. *We looked to the iron* and the custom of carriers and warehousemen, supposing when it was *withdrawn from store to go into consumption at Logansport* the duties would first be paid. If we could have supposed that the owners intended to bond it for transportation to Evansville, we should at once have relied upon our right to *forward the iron in the usual way*, subject to charges.

By the law of 1854, section 4, it is distinctly stated upon what conditions goods may be withdrawn for consumption, viz: payment of duties and *such charges and storage* as may be due. In sections 1 and

3 of said law bonded warehouses and yards owned or leased by government and private bonded warehouses and yards are considered one and the same thing, insomuch as that, while government is not *responsible* for charges, the enforcement of collection of charges is by the language recognized and endorsed.

No bond was ever given by Smith & Hunt exonerating the United States from liability for charges.

The bonds given in this case as penalty for non-delivery of the iron at Evansville were, we think, one hundred thousand dollars. The Treasury Department seized the iron at Logansport and along the track, but did not finally enforce the penalty. They permitted a railroad company to obtain possession of four thousand tons of iron, and to violate the law without enforcing the penalty, with full knowledge that the company had defrauded Smith & Hunt of a large sum due them for charges on the property. The iron was again released upon payment of duty at Washington, and now it is attempted to show that by some neglect of Smith & Hunt they are at fault for the loss incurred.

No other such case has ever, or is likely to occur, and certainly it is one of great hardship to Smith & Hunt, and more so, because in no particular have they failed to do all in their power to prevent this result. They were, in fact, as will be seen by reference to the letters, threatened by the department with prosecution for manifesting too great zeal in their efforts to collect their debt.

I see no new point in the letter to the committee. It is a long argument upon questions conceded in our memorial, but we cannot but call attention to its severe and bitter tones and want of fairness. Its spirit is that of the interested advocate instead of the impartial government willing and wishing to dispense even justice. We also desire to call the attention of the committee to the unfairness of the argument upon the obvious difference between the laws of 1846 and 1854. The practice under the first, and the construction put upon it, was intended to be corrected by the last.

SMITH & HUNT.

JANUARY 3, 1859.